SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 127

E. CREEKMORE, General Chairman of the Brotherhood of Maintenance of Way Employes, Et Al.,
Petitioners,

v.

PUBLIC BELT RAILROAD OF NEW ORLEANS and CITY OF NEW ORLEANS, Et Al.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Nature of Operation of Public Belt Railroad Under Louisiana Cases.

It is contended by respondent that the Public Belt Railroad Commission is immune from the provisions of the Act, inasmuch as it is a political subdivision of the State of Louisiana. It can be seen, after reading the statutes authorizing the operation of this railroad by the State, that the State has no actual control or supervision over the operation or the maintenance of the railroad. The railroad is operated by the Commission. It is operated for profit, and it is operated not unlike any other railroad in the

United States. The Commission, as a Commission, is not about the business of the State, but is engaged in a private enterprise in competition with private carriers.

In the case of *Davis* v. *New Orleans Public Belt Railroad*, 155 La. 504, 99 So. 419, the court, in holding that this particular railroad-defendant was subject to be sued in tort by the estate of a person killed through the negligence of an operation of an agent or employee, said:

> "Having thus shown the nature and origin of the defendant and the manner in which it operates and functions, as well as the limitation placed upon it, can it be said to be exclusively a governmental agency and if not was the work in which it was engaged at the time of the accident such as to render it liable for the death of the plaintiff's son?"

And the court further said:

> "The duty of operating a Public Belt Railroad through a Commission was voluntarily assumed by the City of New Orleans in its original ordinance heretofore mentioned, which was subsequently approved and ratified by the legislature and constitutionally amended. It is true that the said Act and amendment have subsequently hedged it about with certain restrictions and limitations but this was for the protection of the bondholders and to assure a continuance of its operations for the benefit of the people of the community. *However, this has not had the effect of making it a state agency* (italics ours) solely charged with the discharge of a governmental function; nor has there been any provision exempting it from the character of liability here claimed. *Its end and purpose still remain the same, i. e., that it is a department of the City of New Orleans, discharging a municipal or corporate function for private gain and for the private benefit and advantage of its inhabitants.*" (Italics ours.)

The court below held that, inasmuch as the Railroad Commission was a department of the City of New Orleans,

that, therefore, it was a political subdivision of the State of Louisiana. As authority, the court relied not only on *Davis* v. *Public Belt Railroad, supra,* but also on *Solomon* v. *City of New Orleans,* 156 La. 631. In the *Solomon* case, the Louisiana Supreme Court held that, under the Act creating the railroad, there was no reservation of supervision or control in the State, but to the contrary,

> "the entire and absolute control and administration was recognized and confirmed in the city, to be exercised through a Commission to be appointed or which had already been appointed by the city, and the ownership of the railroad system was dedicated to the people of the city. This was but declaratory of an existing fact. It has never been considered, so far as we are advised, a governmental function of the state to build, equip and operate railroads for the benefit of the people of the state at large or for the people of the municipalities. The state was under no particular or special obligation to establish the railroad system under consideration for the inhabitants of the city, and no intention on the part of the state to do so on its own behalf can reasonably be inferred from the legislation referred to. As we have heretofore stated, the only purpose had in view, as clearly appears from the language of the entire Act, was to approve and confirm what the city had already done and to grant such power to the city as was necessary to enable the city to carry out the *business venture* (italics ours) it had inaugurated in the interest of the people of the city. The contention, therefore, that the City of New Orleans in its connection with the Belt Railroad System *is merely representing the state in the capacity of the state's agent is as unjustifiable as it is fundamentally unsound.* Nor is there any greater force in the contention that the Board of Commissioners is a governmental agency separate and distinct from the municipality. The Board is the agent of the city and not of the state. It is subject to appointment by the Mayor and Council and at all times under the control of the Mayor and Council."

Again, in *Higginbothan* v. *Public Belt Railroad*, 192 La. 549, plaintiff argued that the Interstate Commerce Commission had no control over the railroad, since the State, under its sovereign power, had commanded the city to continue to operate the railroad through a Commission. The court, in holding that the railroad was subject to the Interstate Commerce Commission Act, said:

> "Counsel's theory seems to be that inasmuch as the Public Belt Railroad is the property of the people of the City of New Orleans and is operated by the city through an agency created by law, Federal statutes regulating interstate commerce have no application to it because it is in fact being operated by the state itself. The same argument was made in the case of United States *v.* California, 297 U. S. 175. Practically the same situation was presented in that case as in the case at bar, and it was held that the State of California, being engaged in interstate commerce by rail, had subjected itself to the Commerce power of the United States."

The Clear Intent of Congress Was to Include This Particular Type of Railroad Under the Provisions of the Act.

The Lower Court in its opinion ruled that it was the clear intent of Congress to exempt the Public Belt Railroad from the coverage of this Act and that there was no ambiguity or doubt from a reading of the Act that this was the legislative intention. In the interpretation and construction of any statute the primary rule is to ascertain and give the effect to the intention of the legislature.

The Lower Court in its interpretation of employer under Sec. 3(d) of the Act (29 U. S. C. A. 203(d)), took the literal meaning of the word "political subdivision" and held the Public Belt Railroad to be a political subdivision of the

State of Louisiana and, therefore was not included as an employer within the meaning of the Act.

It is petitioners' contention that from a reading of the entire Act and from the public policy expressed in the Preamble of the Act, that it was clearly the intention of Congress to include any railroad in interstate commerce, even though that railroad was owned and operated by a municipality or any commission appointed by a municipality. Sec. 3(d) of the Act exempted all employees of the United States Government, a State Government, or of a municipality, known as a political subdivision, when and if the United States, a State Government, or a political subdivision was acting in its natural orbit of governmental activity and carrying out the primary function and purpose of a State, Government, or of a municipality.

The reason and intent of the statute, as indicated by its general terms, should prevail over the letter of the statute when the plain purpose of the Act will be defeated by strict adherence to its verbiage. In such cases the carrying out of the legislation intention is the prime and sole object of all rules of statutory construction and this can only be accomplished by departure from a literal interpretation of the language employed. Thus it is, that Courts are not always confined to the literal meaning of a statute, because the letter, purpose, and intent of the legislature will prevail over the literal imports of the words.

Shelvy v. *Guy*, 24 U. S. 361, 11 Wheat. 361, 6 L. Ed. 495.

Chicago, etc. R .R. Co. v. *Guffey*, 122 U. S. 561, 30 L. Ed. 1135, 7 S. Ct. 1300.

United States v. *Holy Trinity Church*, 143 U. S. 457, 36 L. Ed. 226, 21 S. Ct. 511.

Brown v. *Duchesne*, 60 U. S. 183, 15 L. Ed. 595, 19 How. 183.

In reading the Act it can readily be seen that it is remedial; that its objects and purposes are beneficial in that it uplifts the standards of living necessary for health and efficiency and the general well-being of labor. It covers all industries engaged in interstate commerce, including the Railway Industry. Since the purpose of the Act is remedial and beneficial it is a familiar rule and a canon of statutory construction that not a strict but a liberal construction should be made, and that as many industries should be made subject to the provision of the Act as possible to the end that the legislative intention should be effectuated in order to carry out the remedial and beneficial objects and purposes of the Act.

In its Preamble of the Act, Congress stated as follows:

> "The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the separate states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.
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> "It is hereby declared to be the policy of Sections 201-209 of this title through the exercise by Congress of its power to regulate commerce among the several states to correct and as rapidly and practicably to eliminate the conditions above referrred to in such industries without substantially curtailing employment or earning power."

Another rule of statutory construction which the court below completely ignored is the well settled rule that the court will not look to a particular clause of an act only, in order to arrive at the intention of the law maker, but the intention of the legislation must be deduced by a view of the whole statute and from its every material part, and by statutes in *pari materia.*

Richardson v. *Harmon,* 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27.

The rule as it is generally understood exists for the purpose of discovering the legislative intention, and statutes relating to the same subject are to be compared and should be read and construed in reference to each other, so that effect may be given to all of the benefits of each, if that can be done by any fair and reasonable construction. This rule applies not only to contemporaneous statutes, but also earlier statutes, because the legislature is presumed to have former statutes before it and to have been acquainted with their judicial construction and to have passed new statutes on the same subject with reference thereto.

Converse v. *United States,* 62 U. S. 463, 21 How. 463, 16 L. Ed. 192.

State v. *Gerhardt,* 145 Ind. 439, 44 N. E. 469, 35 L. R. A. 313.

The Lower Court completely ignored all other Federal legislation passed by the Congress of the United States on behalf of railroad employees, which was binding and covered all of the employees of the Public Belt Railroad of New Orleans. It is not disputed or denied in this record that the defendant carrier is subject to the following Acts of Congress:

"The Safety Appliance Act" (Title 45 U. S. C. A., Sec. 1). This Act of Congress passed on March 2, 1893 in order to protect the public and various employees of the carrier, set up certain safety standards in the operation of its equipment. The Public Belt Railroad is covered by this Act.

The Public Belt Railroad is subject to the Liability for Injuries to Employes due to the negligence of the carrier (45 U. S. C. A., Sec. 51).

Congress has further legislated limiting the hours of service of employees on railroad carriers, known as the "Hours of Service Act" (45 U. S. C. A., Sec. 61-62). In the negligent liability enactment and the hours of service enactment, Congress expressly legislated for the public good on the relationship between the carrier and its employees. The defendant carrier is bound by both of these Acts of Congress.

On July 15, 1913, in order to effectuate the free flow of goods in commerce and to prevent industrial disputes between the carrier and its employees Congress passed an act regulating the relationship between the carrier and its employees, by setting up a method for mediation, conciliation and arbitration in labor controversies between carriers and employees. 45 U. S. C. A., Sec. 101, *et sequitur*. Later this Act was repealed and the present Railway Labor Act was set up by Congress in Title 45 U. S. C. A., Sec. 151, *et sequitur*. This particular statute compels the carrier defendant to recognize the bargaining representative of all its employees and to bargain and treat with the collective bargaining representatives, and to file all its collective bargaining agreements with the National Mediation Board, and further set up Regional Boards of Adjustment throughout the United States to construe and pass upon all provisions of these collective bargaining agreements. The de-

fendant carrier comes within the legislative mandate of this particular Act of Congress.

Congress has set up an Act entitled "Retirement of Railway Employees", 45 U. S. C. A., Sec. 228, *et sequitur,* which is commonly known as the "Railway Retirement Act of 1937", wherein the carrier and its employees, under the "Tax on Carriers and Employees Act", Title 45 U. S. C. A., Sec. 241, must set aside a certain payment to the United States Treasury for the retirement of the employees. Here Congress again motivated by a wise social policy has enacted this legislation for the benefit of the employees of this defendant.

Thus it is, the Congress has legislated in the past, setting the maximum hours of service to be worked by the employees of the defendant carrier; has set up the National Mediation Board to regulate the bargaining rights of these employees and compel the carrier through the processes of the Railway Labor Act to give full freedom of association to the employees in selecting their collective bargaining agreements; and has further set up System Boards of Adjustment, to pass upon the provisions and interpretations of these collective bargaining agreements. Further, Congress has set up the Railway Retirement Act for the pensioning of old employees.

In approaching the construction of the Fair Labor Standards Act, we submit that the court below should have read this Act in the light of the prior legislative Acts of the Congress that attached and bound the defendant carrier even though it was municipally owned. But the court ignored other remedial and social legislation which covers this defendant carrier and which stands *in pari materia* with the Fair Labor Standards Act.

We submit that it is a strained and tortured judicial construction that would hold this defendant carrier subject

to the Hours of Service Act, the Railway Labor Act, the Railway Retirement Act, the Safety Appliance Act and other Federal remedial statutes, and then conclude that Congress never intended it to be covered by a minimum wage act. A correct judicial construction of a statute was adopted by the Circuit Court of Appeals for the Ninth Circuit in the *State of California* v. *Anglim,* 129 F. (2d) 455, where a Belt Line Railroad, owned and operated by the State of California, attempted to evade the provisions of the Railroad Retirement Act, and the court there held the Belt Line Railroad, though owned and operated by the State, to be subject to the Railroad Retirement Act, and reasoned that in construing the Act, prior Acts of Congress of a remedial nature and purpose would be a guide in holding that the Belt Line Railroad was within the Railroad Retirement Act.

The court in the *Anglim* case, *supra,* further reasoned that the State of California departed from its governmental field and went into the proprietary field and lost its cloak of immunity as a sovereign State exempt from the field of Federal taxation.

Congress intended beyond question that good would result from this legislation, and Congress has covered the employees of this defendant carrier by all of its previous beneficial legislation. Thus, it seems that to deny this small group of employees the rights and privileges that are secured to the thousands of other workmen in the Railroad Industry, is a strained construction of the Act.

The Exemption Should Be Strictly Construed.

It should be kept in mind that a strict construction should be placed on the claimed exemption of the defendant carrier and the most liberal construction on the claimed coverage by the plaintiffs. But the court below exempts a

carrier, who is covered by all other Federal legislation, and whose employees are covered by all other remedial railroad legislation, from the minimum wage provisions of the Act.

Thus construing this Act with companion legislation like the Railway Labor Act, we have a Federal statute setting a minimum wage standard and yet the statutory bargaining agent is powerless under the Federal statute to compel the railroad carrier to pay the minimum wage ordered for all other railroad employees in the United States in the Maintenance of Way Department of railroads.

It would be a strange rule of construction that would lead us into the "bad results" and "injurious consequences" by holding this carrier to be exempt under the Act.

> "The legislature is presumed to have intended that good will result from its laws, and a bad result suggests a wrong interpretation." *People ex rel. Beamon* v. *Feitner*, 168 N. Y. 360.
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> "In interpreting a statute it cannot be presumed that the legislature intended unwise or injurious results to flow from its action, and where one construction would result in mischievous or disastrous consequences, a more fortunate construction must be sought." *Hayden* v. *Pierce*, 144 N. Y. 512.

In *United States* v. *California*, 297 U. S. 175, 80 L. Ed. 567, this Court held that a terminal railroad owned and operated by a State for the same purpose as defendant railroad was subject to the Federal Safety Appliance Act. The court said:

> "California by engaging in interstate commerce by rail has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The Federal Safety Appliance Act is remedial to protect employees and the

public from injury because of defective railway appliances (citing cases), and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate. * * * No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the Act whenever a state as well as a privately owned carrier brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection."

In order to bring themselves within the exception under the Act as a "political subdivision", the respondents must bring themselves not only within the letter of the exception but the spirit of the exception. In the case of *Bowie* v. *Gonzalez*, 117 F. (2d) 11, the court said:

> "The scheme of the statute (Fair Labor Standards Act) is broad and comprehensive with the obvious purpose of including all employees in interstate commerce except those specifically excepted. Being a remedial statute, the appellants must bring themselves within both the letter and spirit of the exceptions since they are subject to a strict construction."

And in *Fleming* v. *Hawkeye Pearl Button Company*, 113 F. (2d) 52, the court said:

> "We must assume that all employees in interstate commerce so far as reasonably possible should be made subject to the provisions of the Act. This is emphasized by the title, the Findings and Declaration of Policy contained in Section 2, the inclusiveness of the language of Section 6 ('every employer') and of Section 8(a), reciting that 'the object of a universal minimum wage of forty cents an hour of each industry engaged in commerce or in the production of goods for commerce', etc.

"Section 13(a) (5) (which is an exemption for those in maritime pursuits) creates an exception to the general scope of the Act, and hence is subject to strict construction (citing cases). In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, *must establish it as being within the words as well as within the reason thereof.*" (Italics ours.)

The court below erred in simply reading Section 3(d) of the Act, defining an employer, and should have given, under the circumstances, as liberal a construction on behalf of the employers as possible having the complete Act before it.

In *United States* v. *American Trucking Ass'n*, 310 U. S. 532, 60 S. Ct. 1059, 84 L. Ed. 1345, the court, speaking on the method and the function of the court in the interpretation of a statute said:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intent. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of the statute, particularly in a law drawn to meet many needs of a major occupation.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature understood to give expressly to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases, we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results, but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court

> has followed that purpose, rather than the literal words. The interpretation of the meaning of statutes, as applied to justiciable controversies is exclusively a judicial function. * * * Emphasis should be laid too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes, should not be given a wide meaning contrary to a settled policy, 'excepting as a different purpose is plainly shown'."

To the same effect, see:

Town of Clayton v. *Colorado & S. Railroad Co.*, 51 Fed. (2d) 977;
Barrett v. *Van Pelt*, 268 U. S. 85, 69 L. Ed. 857, 45 S. Ct. 437.

The Operation of the Railroad Is Purely Proprietary.

It is elementary that a governmental state agency is subject to the taxing power of the Federal Government when engaged in an enterprise which is purely proprietary. The immunity that exists on behalf of agencies engaged in the usual functions of the State from Federal taxation is implied from the nature of our Federal system, and is equally a restriction on the taxing power of both the State and Federal Government on the instrumentalities of the other. But the Supreme Court has never allowed this immunity from taxation to be extended so that it would withdraw from the taxing power which has always been traditionally within the Federal Government. The court has always looked to the particular activities in which the State is engaged, in order to determine whether the particular activity is subject to the Federal taxing power. In this connection, it might be stated here that the powers and duties of a municipal corporation fall into two categories—governmental and proprietary. In its governmental activi-

ties the municipal corporation functions as an agent of the State for the benefit of the public generally, and not to promote the private interests of the local community. For example, in matters pertaining to public health, education of the young, prevention of crime and fire, and care of the poor, the city or governmental agency, in the performance of these public services is immune from Federal taxation. The proprietary activities of the municipality provide for the local convenience of the citizens in which, of course, the municipality has a private interest. For example, in the operation and maintenance of water and light plants (*Davoust* v. *Alameda*, 149 Ca. 69, 84 Pac. 760) or a belt railroad (*Davis* v. *New Orleans Public Belt Railroad*, 155 La. 504), construction or repair of sewers (*Baker & Co.* v. *Hollis*, 169 Okla. 253, 36 Pac. (2d) 757), and any business conducted for profit (*O'Donnell* v. *N. Attleboro*, 212 Mass. 243, 98 N. E. 1084), the municipality in the performance of these proprietary functions is bound by all the rules of law and procedure applicable to any other private corporation or individual engaged in like enterprise, operating for private gain.

In the *Solomon* and the *Davis* cases, *supra*, against this defendant-carrier, the courts said that the operation of the railroad was one which a government did not normally undertake, and, therefore, was subject to suit in tort as any other private enterprise, because its operation was purely proprietary; and this Court, in the analogous field of taxation, has held this in the leading case of *Helvering* v. *Powers*, 293 U. S. 214, 79 L. Ed. 291, 55 S. Ct. 171. Here the Commonwealth of Massachusetts was operating the Boston Elevated Railway Company through members of a Board of Trustees set up by the Legislature. The trustees were appointed by the Governor of the Commonwealth and were charged with the duty of managing and operating the company. The trustees claimed exemption from

income tax, upon the ground that they were officers of the Commonwealth of Massachusetts, and that the Boston Elevated Railway was engaged in an operation as an instrumentality of the Government. It will be seen, however, that these trustees were appointed by the Governor of the State, and the City of Boston had no supervision whatever over the railroad. The court held that the trustees were subject to the tax, and said:

> "While the undertaking is for the purpose of the public benefit it is still a particular business enterprise—the operation of a street railway—and the functions of the trustees are limited accordingly."

It is implied in the court's opinion that if it were a political subdivision of the State of Massachusetts operating in a functional activity on behalf of the State, its trustees could not have been subject to this tax. It is submitted that all these cases are analogous to the case at bar, and the analogy is drawn on the implied immunity that exists when a governmental agency is being operated for the functional purpose of the State. We contend that the Public Belt Railroad System—and the cases so hold—is not being operated as a functional operation of the government but as a convenience and a profit-making enterprise to the citizens of New Orleans. Appellees contend that the railroad, being a political subdivision, would not come under the provisions of the Act. Yet, there is no doubt that the taxing power of the Federal Government would reach out to this particular type of enterprise for the purposes of taxation. The record shows that the court below placed "due respect" in the advisory opinion of the Wage and Hour Division that this railroad was exempt. In this regard the court said in the *Helvering* v. *Powers* case, in reference to regulations promulgated by the Treasury Department:

"Treasury regulations, manifestly in an effort to interpret and apply that limitation, provide for exemption from taxation of compensation paid by a state or political subdivision to its officers and employees only in case their services are rendered in connection with the exercise of an essential governmental function. *But the Treasury Department could not by its regulation either limit the provisions of the statute or define the boundaries of their constitutional application.*" (Italics ours.)

There is no question that the interpretation of an administration division of a national or State government should be given "due respect" or "great weight" by the court; but the court is not bound by an opinion rendered by a governmental officer when that opinion is clearly erroneous, and, particularly, when an investigation had not been made of the activity of the governmental enterprise; and in this case there was only an exchange of letters between counsel for the railway and counsel for the Wage and Hour Division. The opinion was certainly in discord with the *Helvering* v. *Powers* case which, continuing the opinion of the court:

"The nature of the enterprise and not the particular incidents of its management would control. In each case the State with its own conception of public advantage is undertaking a business enterprise of a sort that is normally within the reach of the Federal taxing power and is distinct from the usual governmental functions that are immune from Federal taxation in order to safeguard the necessary independence of the State."

and

"If in the instant case the Commonwealth had acquired the property of the Company and had organized management of it in perpetuity by the State government, instead of temporarily, or had taken over all

the street railways in all its cities for direct operation by the Commonwealth, there would appear to be no ground, under the principles established by the decisions we have cited, for holding that this would affect the withdrawal of the enterprise from the Federal taxing power, and the fact that the State has here undertaken public management and operation for a limited time and under the particular restrictions of the agreement with the Company, cannot be said to furnish a ground for immunity."

See:

South Carolina v. *United States*, 199 U. S. 437, 50 L. Ed. 261, 26 S. Ct. 110;
Oliver v. *Worcester* 102 Mass. 489;
Western Savings Fund Society v. *Philadelphia*, 31 Pa. 175.

It may be interesting to note that the Social Security Act and the National Labor Relations Act have set up the same exemption as the Fair Labor Standards Act as to states and political subdivisions thereof, but the administrative agencies of these two governmental bodies and the Courts are not in agreement to the decision rendered below in this case.

In *Boston Elevated Railway Co.* v. *Welch*, 25 Fed. Sup. 809, the plaintiff was the same Boston Elevated Railway in the *Helvering* v. *Powers* case, and it sued the Social Security Administrator for recovery of social security tax alleged to have been illegally assessed. Under the Social Security Act, the exemption is broader than in the Fair Labor Standards Act, and is as follows:

"services performed in the employ of a state, a political subdivision thereof or *an instrumentality of one or more states or political subdivisions.*" (Italics ours.)

It is interesting to note also that the Commissioner of Internal Revenue had regulated as exempt under the Act—

> "every unit or agency of government without distinction between those exercising functions of a governmental nature and those exercising functions of a proprietary nature."

But the Court, in its determination of whether the Boston Elevated Railway was actually a governmental agency or an instrumentality or a political subdivision of the state, did not agree with the regulation of the Commissioner of Internal Revenue, and said:

> "This regulation, of course, adds nothing to the strength of the exemption in the statute, but is indicative of a broad interpretation of the word 'instrumentality' so as to include within the exempted class all units or agencies of goverment whether engaged in performing essential governmental functions or not."

The Court held that the plaintiff, the Boston Elevated Railway, was not an instrumentality of the government.

> "The plaintiff contends that the facts show that the Commonwealth of Massachusetts has undertaken the carrying out of an enterprise to accomplish an admitedly public purpose in the interests of the general welfare. *Assuming all of this to be true, it does not necessarily follow that the adoption of such a policy by the Commonwealth operates to change the plaintiff from a private business into an instrumentality of the government within the meaning of the Social Security Act.*" (Italics ours.)

So that we have a decision under an Act which exempts a political subdivision or "an instrumentality of one or more states or political subdivisions" holding that the Boston Elevated Railway, which originated as shown in the *Helvering* v. *Powers* case, is subject to the provisions of the Social Security Act, even though the Commonwealth of Massachusetts had undertaken the operation of the railway. The

purpose of that statute was also remedial and for the good of employees, and, here again, we have a clear intent shown on the part of Congress to give to as many employees as possible the advantages obtainable under the Act. In its opinion the Court cited the *Helvering* v. *Powers* case.

See: *Buckstaff Bathouse Co.* v. *McKinley*, 308 U. S. 358, 84 L. Ed. 322.

Under all these Acts, including the one in question, the purpose of Congress was to uplift the worker. Under the Social Security Act, it is for the security of employees in their old age, and under the Fair Labor Standards Act for a high standard of wages and hours, and under the Wagner Act for the protection of employees in their right to secure these high standards of wages and hours through collective bargaining and their right to select a representative or union of their own choice. The decision of the Court Below, if it is upheld, destroys the rights and the advantages to be derived by this particular class of employees, because they happen to be working for a railroad operated by a Board of Commissioners under the City of New Orleans. After examination of all the Acts of Congress in reference to railroads and the decisions under those Acts, we can only come to but one determination, and that is that Congress clearly intended that employees of this particular type of railroad should be covered under the Fair Labor Standards Act. It would be an absurd position to take that the Public Belt Railroad is subject to the power of Congress in regulating interstate commerce under, for example, the Hours of Service Act, and not for the payment of wages under the Fair Labor Standards Act. If the Congress meant—and it is clearly shown that it did mean—to give the employees of all railroads, including this railroad, the benefits and advantages of shorter hours, can it logically be contended that it did not mean to give the same

employees the benefits of the Act in question, the purpose of which was higher wages?

Conclusion.

The Public Belt Railroad, at best is an agency of the City of New Orleans, engaged in a private enterprise for the benefit and profit of the people of the City of New Orleans. The state exercises no control or supervision over the railway. The railroad is subject to the Interstate Commerce power of the Federal Government. Congress never intended that these men be denied a living wage because they were employed by a Commission set up by the City of New Orleans. Congress has specifically granted to them old age benefits under the Railroad Unemployment Insurance Act and under the Retirement of Railroad Employees Act, and there is no justifiable or logical reason that it can be said that Congress intended that these employees and this employer should not come within the strict tenor of the Wage and Hour Act.

JAMES J. FARNAN,
MARTIN F. O'DONOGHUE,
THOMAS X. DUNN.